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SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 443

HARRY O. PAULY,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees of The Denver and Rio Grande Western Railroad Company,

Respondents.

BRIEF OF PETITIONER

Opinion of Courts Below

The verdict of the jury in Petitioner's favor was rendered September 28, 1944 (R. 9) and the Judgment of the Court pursuant thereto on September 29, 1944 (R. 18, 19). The Opinion of the Supreme Court of Utah set forth at R. 170 to R. 197, is not yet reported in the Utah Reports, but appears at 166 Pac. 2d 501.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Supreme Court of Utah was rendered on February 18, 1946 (R. 197). Petition for rehearing was denied on May 31, 1946 (R. 198). Petition for

Writ of Certiorari was filed on August 29, 1946 and granted October 7, 1946 (67 Sup. Ct. 102). The judgment of the Supreme Court of Utah is based upon its application of the United States statute commonly called the *Federal Employers' Liability Act,* 45 U. S. C. A., Secs. 51-59; 35 *Stat.* 65, as amended; 36 *Stat.* 291, and 53 *Stat.* 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the *Judicial Code,* as amended by *Act* of *February* 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. A. Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A. Sec. 350. Petitioner claimed in his Petition for Rehearing filed in the Supreme Court of Utah (R. 197-198) and claims here that the Utah Court in holding as matter of law (1) that the place where Petitioner was working when he was injured was not a place to work and (2) that defendants were not negligent in the construction, maintenance and use of their bridge at Chacra, Colorado, and (3) that petitioner's conduct was the sole proximate cause of his injuries, impaired the substantial rights of Petitioner. This raises a federal question.

Garrett v. Moore-McCormack Co., 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246;

St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. Ed. 1129, 33 S. Ct. 651;

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Chicago, etc. R. Co. v. Devine, 239 U. S. 52, 60 L. Ed. 140, 36 S. Ct. 27;

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Southern Ry. Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564, 34 S. Ct. 897;

Norfolk & S. R. Co. v. Ferebee, 238 U. S. 269, 59 L. Ed. 1303, 35 S. Ct. 781.

Statement of the Case

Petitioner, an experienced conductor, who had been employed by respondents since boyhood and in train service seventeen years (R. 78, 79), was injured while engaged in the performance of his duties as conductor by a fall from a train standing on respondents' bridge over North Canyon Creek within switch limits at Chacra, Colorado, at about 11:50 P. M. on the 27th day of January, 1944 (R. 92).

Upon trial of his action brought under the Federal Employers' Liability Act, the jury returned a verdict assessing total damages in the sum of $75,000. (R. 9), $25,000 was deducted for contributory negligence. The trial court granted respondents' Motion for a New Trial unless petitioner consent that the verdict be reduced to $34,500 (R. 20). He consented and the Motion for New Trial was denied and judgment entered accordingly (R. 20-21).

Respondents were charged with negligently and carelessly failing to provide petitioner a safe place to work in that they failed to equip the bridge with foot walks and hand rails, or to provide lights or markers to indicate its presence and dimensions when they knew that it was the custom and practice of their train crews to stop trains on the tracks at Chacra at all hours of day and night and in all kinds of weather for the purpose of inspection and repair and that in darkness the bridge could not be seen or distinguished from its surroundings, and under such circumstances was dangerous and hazardous to respondents' employees; that as a result of such negligence petitioner was caused to fall headlong over the edge of said bridge when he stepped off the caboose in the performance of his usual and ordinary duties (R. 2-5).

The train upon which Petitioner was working at the time of his injury was a west bound "Red Ball" freight (R. 139)

and consisted of eighty-six cars, an engine and caboose (R. 82). Shortly after leaving Funston, which is six miles east of Chacra, petitioner and the rear-end brakeman, Ventura, from their position in the caboose, noticed fire flying from the south side of the train fifteen or twenty car lengths forward (R. 35, 86). This indicated that brakes were sticking and that the train should be stopped and the difficulty remedied, (R. 36, 86). By means of a red fusee displayed from the window of the cupola the engineer was given a signal to stop the train (R. 36, 70, 86). The fireman also noticed the sparks and fire and so reported to the engineer (R. 69). The head-end brakeman, from the engine, observed the red fusee, reported the same to the engineer and acknowledged the signal by motion of his lantern (R. 69). According to custom and practice the train was not stopped on the main line when the trouble was first discovered, but the journey was continued the remaining four or five miles until the passing tracks at Chacra were reached, where the train could be stopped and necessary inspection and repairs made without tying up respondents' railroad. (R. 37, 69, 76, 77, 87, 88).

The distance between the east and west switches of the passing track at Chacra is about 6600 feet. A bridge 92 feet long and 26 feet wide, spanning North Canyon Creek, is located approximately 2000 feet west of the east switch. The main line track is south of the passing track; a space of approximately 12 feet separates the inside rails of the two tracks; the distance between the south rail of the main line track and the outside extremity of the bridge is two feet, nine inches; the overhang of the ordinary caboose is approximately two feet, six inches; the distance from the top of the rails to the bottom of the creek at the center of the bridge is approximately seventeen feet, nine inches (R. 23-31, Ex. A, R. 205). There were no footwalks, platform or guard rails on the south side of the

bridge. (Ex. A, R. 205, Ex. E, R. 207, Ex. H, R. 208, Ex. M, R. 210, 217). There were no lights or markers to give warning of its location or dimensions (R. 42, 43, 67, 73, 95). The roadbed in that territory is constructed of black slag and on a dark and stormy night is indistinguishable from the darkness of empty space. (R. 34, 67, 68, 84, 85, 92, 96, 142, 143). It is customary to stop trains on these tracks for the purpose of inspection and repair and to permit other trains to pass (R. 43, 44, 67, 68, 86, 87, 88). Where mechanical trouble of such nature as not to require an immediate stop is discovered in trains moving toward Chacra it is customary to continue the journey until the train reaches that point. When trains are stopped there following discovery of trouble enroute it becomes the conductor's duty to immediately dismount from the caboose, proceed to the point of trouble and inspect and repair it as soon as possible. When petitioner first observed the flying fire, he, as well as all other members of the train crew, determined that the train should not be stopped until it reached Chacra (R. 86-88).

The work of train protection, inspection and repair made it necessary for petitioner, the rear-end and head-end brakemen to dismount from the train and pass along and over the territory adjacent to the tracks (R. 38, 40, 89, 91, 92). Unfortunately the train was stopped when the caboose was standing upon the unguarded and unlighted bridge (R. 41, 42, 92, 94, Ex. K, R. 209). The night was dark and stormy (R. 89, 90). Ventura testified that it was "really dark that night." (R. 38). Linkins, the engineer, testified, "It was a black, stormy night, real dark . . ., have to feel your way." (R. 72). "Snow was just beginning to fall." (R. 37, 72). As the train was pulling to a stop, petitioner and Ventura prepared to dismount. At that time an east bound passenger train was passing on the

adjacent tracks (R. 38, 89). Ventura, pursuant to his duties, dismounted from the steps located at the south rear corner of the caboose and proceeded back along the track to protect the rear end of the train. He dismounted on the south side, the side opposite and farthest removed from the passing train, in compliance with the safety rules and because this was the safe and proper thing to do (R. 38, 39).

Petitioner likewise prepared to alight from the caboose on the south side because of the safety rules and factors above mentioned (R. 90), and for the additional reason that he had noticed the fire flying from the south side of the train and knew that the trouble to be located and remedied was on that side (R. 90, 91, 93). He "naturally" alighted from this side because it was there he saw the trouble (R. 91). With lantern and fusee in hand, he stepped upon the steps of the caboose, struck the fusee, glanced down, it was all black, and there being no lights upon the bridge to reveal its presence and it appearing that he was alighting on the shoulder of the right of way (R. 91, 92, 136, 137), stepped off and because of the nonexistence of a platform or footwalk, fell to the creek bed below, a distance of about eighteen feet (R. 93), and sustained the serious and permanent injuries complained of. Petitioner couldn't see the bridge, he testified (R. 95, 143): "I didn't see any bridge. It looked to me there was—like the shoulder of the ground. It was all black before me."

Although Ventura alighted from the caboose just before it came to a stop on the bridge, he did not see or know the bridge was there (R. 54). After he had proceeded back some distance, he looked westward along the south side of the train and observed a yellow fusee burning in the bottom of the creek. He dropped a red fusee, ran to the bottom of the creek and found petitioner lying there.

He asked petitioner how he fell and he stated: "I thought we was past the darned bridge." (R. 40, 51).

Petitioner testified that he was acquainted and familiar with the bridges over gullies, creeks, canyons, etc., within switch limits in the division embracing Chacra; that with the exception of the bridge at Chacra, all such bridges were equipped with footwalks and hand rails and with one exception painted white (R. 140-1-2, 145-6).

SPECIFICATION OF ERRORS

1. The Supreme Court of Utah erred in setting aside the jury's verdict and dismissing petitioner's cause.

2. The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was working when he was injured was not a place to work.

3. The Supreme Court of Utah erred in vacating and setting aside the jury's verdict finding respondents negligent in the construction, maintenance and use of the bridge at Chacra, and in holding that as matter of law respondents were not so negligent.

4. The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law.

SUMMARY OF ARGUMENT

1. THE SUPREME COURT OF UTAH ERRED IN SETTING ASIDE THE JURY'S VERDICT AND DISMISSING PETITIONER'S CAUSE.

The fundamental and most apparent error committed by the Supreme Court of Utah was its failure to consider and decide the issues raised and presented in the light of recent landmark and controlling decisions of this court. The basic principles governing the protection and enforce-

ment of rights arising under the Federal Employers' Liability Act as announced by this Court were completely ignored and petitioner was wrongfully deprived of the benefits awarded him by the jury and trial court.

In its decision the majority disregarded substantial evidence supporting the verdict. The evidence revealed that petitioner, when injured, was engaged in the performance of his required and regular duties at a place provided by respondents for that purpose. The evidence demonstrated that the place was dangerous and unsafe for its foreseeable use and that there was a causal relationship between the dangerous and unsafe condition of the work place and petitioner's injuries.

The testimony supplied an adequate evidentiary basis for the verdict and the holding of the State Supreme Court was therefore contrary to and in conflict with controlling decisions of this Honorable Court.

II. THE SUPREME COURT OF UTAH ERRED IN HOLDING AS MATTER OF LAW THAT THE PLACE WHERE PETITIONER WAS WORKING WHEN HE WAS INJURED WAS NOT A PLACE TO WORK.

There was substantial evidence that the passing tracks and adjacent territory at Chacra, Colorado, was a place to work and that it had been so used for a long time prior to the accident and was being used as a work place by petitioner and other members of his crew according to well-established practice at the time he was injured.

The evidence demonstrated that the crippled train was moved several miles after the sticking brake was discovered in order to bring it to a place where it could be stopped, inspected and repaired without delaying other trains or obstructing the movement of traffic and, as the witnesses said, "without tying up defendants' railroad."

III. THE SUPREME COURT OF UTAH ERRED IN VACATING AND SETTING ASIDE THE JURY'S VERDICT, FINDING RESPONDENTS NEGLIGENT IN THE CONSTRUCTION, MAINTENANCE AND USE OF THE BRIDGE AT CHACRA, AND IN HOLDING THAT AS MATTER OF LAW RESPONDENTS WERE NOT SO NEGLIGENT.

The bridge at Chacra was located within the switch limits of a passing track used by respondents at all hours of the day and night and in all kinds of weather for the purpose of stopping, inspecting and repairing trains as well as for the purpose of permitting trains to pass. The railroad in the division within which Chacra is located is single track and the stopping of trains upon the main line necessarily obstructs and delays other trains. When trouble which does not require an immediate stop is discovered in trains approaching these passing tracks from either direction, the custom is to continue the journey until the passing tracks are reached, where the train can be stopped and necessary inspection and repairs made without delaying other trains or obstructing the movement of traffic. The work of inspection and repair necessarily requires the conductor to dismount from the caboose at the point where it is stopped and proceed forward along the train over the territory adjacent to the track to the point of trouble. It also requires the head-end brakeman to dismount from the locomotive at the point where it is stopped and proceed back along the train to the point of trouble and requires the rear-end brakeman to dismount from the caboose at the point where it is stopped and proceed back along the track to protect the rear end of the train by flagging. Well knowing of the use made of this territory by their train crews, respondents nevertheless failed to make the bridge, which was within and a part of this work

area, safe for its foreseeable use. No foot walks, guard rails, lights or markers were provided. The bridge was dangerous and unsafe to men required to alight from engines or cabooses stopped upon it in the nighttime and was likewise dangerous and unsafe to trainmen required to walk along the south side of trains standing over said bridge in the nighttime while engaged in the work of inspection and repair. The jury found that petitioner was injured because of the unsafe condition of this bridge.

IV. THE SUPREME COURT OF UTAH USURPED THE FUNCTIONS OF THE JURY IN DETERMINING PROXIMATE CAUSE AS MATTER OF LAW.

The jury found upon substantial evidence and proper instructions that the failure of respondents to properly equip the bridge for safe foreseeable use contributed to the cause of petitioner's injuries. The Utah Court held as matter of law that the condition of the bridge did not so contribute, but that the sole proximate cause of petitioner's injuries was his own lack of due care.

There was substantial evidence to the effect that petitioner would not have been injured had the bridge been equipped for safe foreseeable use. The jury found a causal relationship between the failure to equip the bridge for such use and petitioner's injuries. By its holding that as matter of law the sole proximate cause of petitioner's injuries was his own lack of due care, the Utah Court has wrongfully sanctioned the use of contributory negligence as a complete defense in an action arising under the F. E. L. A.

ARGUMENT

Point I.

The Supreme Court of Utah erred in setting aside the jury's verdict and dismissing petitioner's cause.

It becomes apparent from a consideration of the prevailing opinion of the Utah Court that recent controlling landmark decisions of this Honorable Court were ignored and disregarded. The trial Judge at the conclusion of the presentation of evidence denied respondents' motion for a directed verdict (R. 11) and thereby determined that the evidence was sufficient to require submission of the issues of respondents' negligence, proximate cause, and petitioners' contributory negligence to the jury. Eight jurors, on their oaths, found respondents guilty of negligence which in whole or in part proximately caused petitioner's injuries. The trial court denied respondents' motion for new trial and thus held the evidence sufficient to sustain the verdict. Two members of the Supreme Court of Utah were of the opinion that the verdict of the jury rested on an evidentiary basis and should be affirmed but the other three members of that court held that reasonable minds could not differ upon the proposition that the evidence was insufficient to support the verdict.

It is respectfully submitted that the prevailing opinion of the Supreme Court of Utah does violence to controlling decisions of this Honorable Court.

In *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A L R. 967, this Court stated:

> "It appears to be the clear Congressional intent that to the maximum extent proper, questions in actions arising under the Act should be left to the jury,"

and, in *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 87 L. Ed. 1444, 1447, 1448:

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.'

Jacob v. New York, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. *To deprive these workers of the benefits of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.* • • •

"• • • all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue, as well as issues involving controverted evidence. To withdraw such a question from the jury is to usurp its functions."

The prevailing opinion of the Utah Court is the best and most convincing evidence of the stress and strain under which it was produced. Its labored and strange conclusions and syllogisms speak eloquently of the doubts and difficulties which apparently beset the majority in bringing forth the judicial declaration which, up to this point, has defeated petitioner's cause. There is no better proof than the challenged opinion that even in the minds of the majority this is "a close or doubtful case" and, therefore, was properly submitted to the jury.

In reinstating a verdict for plaintiff which had been vacated and set aside by a State Supreme Court, this Court, in *Lavender v. Kurn*, 326 U. S. 713, 66 S. Ct. 740, 90 Adv. Ops. L. Ed. 692, 696, states:

> "• • • The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67-68, 87 L. Ed. 610, 617, 618; 63 S. Ct. 444, 143 A. L. R. 967; Bailey v. Central Vermont R. R. Co., 319 U. S. 350, 353-354, 87 L. Ed. 1444, 1447, 1448, 63 S. Ct. 1062; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 N. C. C. A. (N. S.) 647. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.*" (*Italics ours.*)

The Supreme Court of Utah, disregarding the law as declared in *Tiller v. Atlantic Coast Line R. Co.*, supra, employed the contributory negligence of petitioner to determine the questions of respondents' negligence and proximate cause, contrary to the provisions of the F. E. L. A. In the Tiller case at p. 66 of 318 U. S., p. 617 of 87 L. Ed., this court declared:

> "The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon."

The majority of the Utah Court searched and combed the record for evidence, lack of evidence and conflicting circumstances to support the strained conclusion that petitioner was not entitled to a jury trial under the F. E. L. A. Noteworthy efforts were made to demonstrate that the bridge was not within a work area even though it was undisputed that petitioner was actually working there when injured. The majority apparently became satisfied that as matter of law the bridge was safe in whole because there was evidence that it was safe in part.

The jury selected and acted upon the reasonable inference that the passing tracks and adjacent territory at Chacra were used as a place for the inspection and repair of trains and to that extent was a work place. The majority being in disagreement with the jury on the inferences and conclusions selected by it, but apparently unmindful of the oft repeated admonition of this Court that "it is the function of the jury to select from among conflicting inferences and conclusions that which it considers most reasonable," decreed that the verdict must fall. By

judicial choice the majority, overriding the power of selection residing in the jury, made certain controlling inferences. They state:

> "The inference from all the other testimony as to the use of the passing tracks was that they were for the purpose of passing and that, if there was trouble with the train, it endeavored to reach the nearest passing tracks in order not to block traffic; that this use was incidental and a convenience and that they were not used generally for inspection and if used to inspect in case of trouble that such place was no more a place to work in the matter of inspection or repairs than was any other similar part of the railroad line." (R. 177-178)

And, also:

> "Ventura's testimony can hardly be construed to mean that inspections were customarily conducted at Chacra regardless of trouble or that that station was singled out in case of trouble as the one passing track into which the train should customarily proceed in case of trouble, but, if it can be so construed, it must be disregarded as totally at variance with the justifiable inferences of other testimony and at variance with the testimony of what must necessarily be done in cases of emergency." (R. 178)

The act of the Court in thus defeating the right of the jury to choose and select the inferences which to it seemed most reasonable was nothing short of judicial usurpation of the powers and functions of the jury.

In *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 88 L. Ed. 520, 525, this Court stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the

> reasonableness of the particular inference or conclusion, drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of the witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

We respectfully submit that the Supreme Court of Utah has in this case failed to construe and apply the F. E. L. A. in accordance with the foregoing controlling decisions; that it abdicated its duty to guard and protect the right of petitioner to a jury trial and usurped the functions of the tribunal chosen by Congress to decide the disputed questions of fact here presented.

Point II.

The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was working when he was injured was not a place to work.

The Supreme Court of Utah, in determining this issue adversely to petitioner, amongst other things, stated:

> "The main road was single track. The passing track was one of many on the road to take care of train 'meets' • • • When there is trouble with the moving equipment on the road and it is possible to reach the passing track at Chacra the train moves in there so as not to hold up traffic. It is a fair inference that such sensible procedure is followed anywhere in single track territory • • • There is nothing to show that the procedure is any different at the Chacra passing track than at any other passing track when a train in trouble is moved there for inspection and remedy. Indeed, the same sort of inspection and remedy in regard to hot boxes, sticking brakes, break-in-twos, broken air hose might have to be made anywhere on the main line if a passing track could not be reached." (R. 174)

And, continuing:

> "If the passing track at Chacra is a place to work, then every other passing track on the road is by the same token a place to work. And in fact since repairs, adjustments or temporary improvisations may be necessary anywhere at any time along the main line, the whole main line would then have to be considered as a place to work for train crews engaged in spotting defects in cars or the locomotive which the motion of the train revealed and which interfered with this movement." (R. 174, 175).

After thus finding in effect that the territory within switch limits at Chacra was a place to work, the Court states (R. 177):

> "We do not think there is sufficient evidence to go to the jury on the question of whether the passing tracks at Chacra were a place to work."

What is a place to work? The answer is obvious. It is simply a place where one or more persons work. Labored explanation and construction of the phrase is not helpful.

> "There is no escape from the meaning of these words. Explanation cannot clarify them and ought not to be employed to confuse them or lessen their significance."
>
> *St. Louis Iron Mountain & Southern Ry. Co. v. Taylor,* 210 U. S. 281, 295; 28 S. Ct. 616, 621; 52 L. Ed. 1061, 1068.

In the usual course of his employment it was necessary for petitioner to work at the time and place where he was injured. The place was within and a part of an area where the work of dismounting from trains, train inspection and repair was customarily performed. The evidence on this point was not in conflict. Three witnesses were called and each testified that the territory between switches at Chacra was a work place and that its usage as such by petitioner and his crew at the time of his injury was in keeping with well-established practice.

Ventura testified that it was common practice for trains to stop and to pass one another at Chacra; that when there was trouble with a train a red fusee was displayed and the train stopped there in order to make an investigation (R. 43, 44).

Linkins testified that when anything happens to a train which makes stopping necessary, it is customary to try to stop between switches so as to avoid tying the railroad up, that when the trains are so stopped the train crew dismounts at once and attempts to ascertain what the trouble is. The head-end brakeman proceeds back, the conductor forward until he meets the head-end brakeman or reaches the point of trouble and the rear-end brakeman goes back to flag (R. 68, 69).

Petitioner testified that whenever a train is stopped at night on these tracks the rear-end brakeman is required

to dismount from the caboose at once and proceed back to protect the rear end of the train. When trouble, which does not require an immediate stop, is discovered in a train moving toward Chacra the journey is continued until these passing tracks are reached and when the train is stopped there under such conditions, it is the duty of the head-end brakeman to dismount from the locomotive and proceed back along the train and the duty of the conductor to dismount from the caboose and proceed forward along the train to the point of trouble, and repair it if possible. (R. 84, 87, 88).

All of the witnesses testified that this customary procedure was being followed at the time petitioner was injured. There was no conflicting evidence. The holding of the majority that the tracks and adjacent territory within switch limits at Chacra was not a place to work is not only unsupported, but is contrary to the evidence and to the principles announced in *Bailey v. Central Vermont R. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062. The employee in that case was fatally injured by a fall from an unguarded bridge. This Court held that the railroad was required to use reasonable care in furnishing a safe place to work and declared:

> "* * * That duty of the carrier is a 'continuing one' * * * from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

In the Bailey case the unguarded bridge was used about once a year by the defendant's employees and this Court found it to be a work place. In view of this decision how can the opinion of the Utah Supreme Court, holding that as matter of law a place which is continually and customarily used by defendant's employees in the performance of their duties is not a place to work, be affirmed?

The fact that the train was not stopped on the main line when the trouble was first observed, but the journey continued until the passing tracks were reached, and that each and every member of the train crew understood that this was the proper and customary thing to do indicates that these passing tracks were known and understood to be the place provided by respondents to stop trains and make necessary running repairs and inspections. The Utah Court does not discuss the point as to whether or not dismounting from cars or engines, walking along trains, and inspecting and repairing them is work within the meaning of the phrase "place of work," but we do not believe disagreement on this point is possible. In order to inspect and repair it is necessary to dismount. In order to inspect it is necessary to pass along the trains over the territory adjacent to the tracks. Every member of the train crew became aware of the train trouble within a short space of time after its initial discovery and likewise knew that this trouble must be remedied and that this would require work and labor on the part of the train crew. Each man knew that this work must be performed either on the main line or at a more appropriate place, and the conclusion reached by each was that the work should be done at Chacra, the place provided for that very purpose and not on the main line. They knew that it would be improper for them to stop the train on the main line and thereby obstruct the flow of traffic over respondents' single track railroad. They knew that their employer had provided for this and similar occurrences by constructing and maintaining passing tracks where crippled trains could be moved off the main line and the work of inspection and repair performed without delaying other trains. The engine crew never hesitated; the train was moved in on the passing tracks and brought to a stop when the locomotive was some 600 feet to the east of the west switch at Chacra (R. 70).

The engineer did not require the display of stop signals. It is interesting to note that as soon as the train stopped every train crew member, without further orders or instructions, undertook the immediate performance of his usual duties, and in so doing subjected this territory to use as a work place. Ventura dismounted and proceeded back along the track with his flagging equipment (R. 38, 39, 40). Arvis, the head brakeman, dismounted from the locomotive and proceeded back along the train toward the rear end (R. 70, 71). Petitioner was engaged in the act of dismounting from the caboose preparatory to proceeding forward to the sticking brake when injured. To each of these men this area was a work place.

It is respectfully submitted that the evidence was sufficient to provide the required evidentiary basis for the finding that the territory between switches at Chacra was a place to work and being such it was respondents' nondelegable duty to maintain it, including the bridge, in a reasonably safe condition for its foreseeable use.

The Utah Court supports its major conclusion that this territory was not a place to work by considering all of the uses which were not made of it. Such consideration seems idle, useless and impotent. The question is: What were these tracks used for? Not, what were they not used for? The reasoning of the Utah Court in reaching its challenged conclusion is interesting. Time and space will not permit or justify a discussion of all of the labored efforts of the Court, but, in passing, we can not refrain from calling attention to the two remarkable syllogisms employed by the majority in lieu of proof and sound legal reasoning:

> (1) If the passing tracks at Chacra be a place to work, then all of the passing tracks on the road are places of work, therefore, the passing tracks at Chacra is not a place to work.

And

> (2) If the passing tracks at Chacra be a place to work, the respondents' whole main line is a place to work, therefore the passing tracks at Chacra is not a place to work.

It seems sufficient to observe that no proof was offered by either party as to the use made of other passing tracks or the main line. Proof of these matters was regarded by all parties as immaterial and without value. Petitioner assumed that his burden was discharged when proof was produced to the effect that the territory between switches at Chacra was ordinarily and customarily used as a work place and that it was being so used at the time he was injured.

The Utah Court apparently felt that approval of the jury's finding that this territory was a work place would place upon respondents the unduly heavy burden of making all of the territory along the main line as well as that between switches reasonably safe as work places.

This Court long ago, in the case of *St. Louis, I. M. & S. Ry. Co. v. Taylor,* 210 U. S. 281, 295, 28 S. Ct 616, 52 L. Ed. 1061, 1068, denounced this hardship argument in definite and positive language. We quote:

> "• • But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interest of the employee and of the public. Where an injury happens through the absence of a

safe drawbar there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended and to seek some unnatural interpretation of common words."

It is respectfully submitted that the proof was ample to support the inference that frequent stops at Chacra for the purpose of inspection and repair could well be anticipated, thus distinguishing this territory from main line trackage.

The Utah Court states that as far as petitioner's work on the train was concerned the train, roadway and bridge constituted a safe place to work (R. 175-176). In making this remarkable observation the Court is apparently oblivious to the fact that petitioner could not inspect or repair the sticking brake from his position in the caboose.

The Court attempted to distinguish the case at bar from the many cases cited in the opinion where the responsibility of furnishing reasonably safe places for their employees to work was imposed on railroads on the grounds that the work described in those cases was confined to a limited locus or that the employee was employed in switching operations or in giving signals or checking cars, delivering paint, etc. (R. 176-177). This seems a rather

strained and unreasonable limitation. Injury usually occurs at some particular spot or in some limited area. Area limitation as far as petitioner knows has never been regarded as a factor in determining whether or not a certain place was a work place. Certainly it was never so considered by any of the courts in the cases referred to. In the case at bar the point where it became necessary for petitioner to dismount from the caboose and the location of the sticking brake was each confined to a limited locus. So it is apparent that the case at bar cannot be distinguished from those cited by the court on that ground.

The Utah Court loses sight of the controlling importance of what was done by petitioner and other employees at Chacra when it seeks to distinguish authoritative cases on the ground that the employees there involved were performing a different type of work than was petitioner at the time he was injured. The important consideration should be whether work was performed, the type is of no consequence. That switching was not done by crews at Chacra does not alter the fact that the crews were working when they alighted and used the territory adjacent to the tracks in going to and from the points where repairs and inspections were made. It was the duty of the crew to locate and repair the sticking brake and to protect the train by flagging. Dismounting and proceeding to the place where the repairing and flagging was to be done was work to the same extent as the actual repairing and flagging. See *Anderson v. Mt. Clemens Pottery Co.*, 66 Sup. Ct. 1187, 326 U. S. and *Rashaw v. Central Vermont Ry. Inc.*, 133 F. 2d 253 (2 C. C. A. 1943).

The Utah Supreme Court has failed to recognize the effect of the 1939 amendment abolishing the defense of assumption of risk upon cases similar to the one at bar. Prior to that amendment a case founded entirely upon

negligence in failing to furnish a safe place to work could not have been successfully prosecuted by an injured employee, inasmuch as the defense of assumption of risk generally afforded a complete defense to cases of that type.

Miller v. Western Pacific Railroad Company, 73 Utah 442; 274 Pac. 945 (1929);
Laub v. San Pedro L. A. & S. L. R. Co., 47 Utah, 155; 152 Pac. 467 (1915);
Oklahoma City-Ada-Atoka Railroad Co. v. Kirkbride, 179 Okla. 428, 65 Pac. 2d 1021 (1937).

For that reason, prior to the 1939 amendment, actions to recover for injuries sustained in accidents such as exemplified in the case at bar were usually founded upon a charge of negligence of other employees and not upon a failure to furnish a reasonably safe place to work.

This was undoubtedly the situation in the case of *Baltimore & Ohio R. Co. v. Berry,* 286 U. S. 272, 52 S. Ct. 510, 76 L. Ed. 1098, a case strongly relied upon by respondents. The plaintiff charged the railroad company with the negligence of its engineer in bringing the train to a stop when the caboose was standing over the trestle and with the negligence of its conductor in ordering the injured brakeman to dismount from the caboose while it was standing on the trestle. No claim or charge was made that the defendant had failed to furnish a reasonably safe place to work and thus the plaintiff was able to avoid the defense of assumption of risk. Cases which follow the Berry case, are distinguishable from the case at bar. The plaintiffs in those cases did not reply upon a breach of the defendant's duty to furnish a reasonably safe place to work, but upon the negligence of fellow employees.

Yazoo & M. V. R. Co. v. Sudduth, 171 Miss. 619, 157 So. 527 (1934), (Cert. Den.) 295 U. S. 748, 55 S. Ct. 827, 79 L. Ed. 1693;

Missouri Pacific R. Co. v. Hathcock, 200 Ark. 294, 139 S. W. 2d 35 (1934),

Marinko v. Chicago M. & St. P. & P. Ry. Co., 63 S. Dak. 256, 257 N. W. 639 (1934),

Davis Agt., v. Shirer, 288 Fed. 293 (1923).

In the case at bar the Utah Court has reached the same result as reached in the above cases even though Congress has obliterated every vestige of the defense of assumption of risk.

The Utah Court places reliance upon the case of *Kenney, Adms. v. Boston & Maine R. R. Co.*, 92 N. H. 495, 33 Atl. 2d 557, 560. An examination of the opinion will show that the decision there does not support the respondent nor the majority of the Supreme Court of Utah. The Court in the Kenney case observes that the locomotive came to a stop on the bridge for no explainable reason and "no witness could assign any reason for stopping at that point and there is no evidence at all that the business at hand required it."

The Court points out that the test of duty to maintain a railroad bridge safe as a work place is one of anticipation and indicates that if the use of the bridge as a work place was foreseeable, it would have been the defendants' duty to keep it reasonably safe for its foreseeable use. All of the findings which actuated the Supreme Court of New Hampshire to hold adversely to the plaintiff in the Kenney case are absent from the case at bar. Here the evidence demonstrated the use of the territory between switches at Chacra including the bridge as a work place and that petitioner was using it according to custom and practice at the time he was injured.

Petitioner relies upon the holding of this Court in *Bailey v. Central Vermont R. Co.*, supra, and *Cawman v. Penn-*

sylvania Reading Seashore Lines, 110 Fed. 2d 832 (3 C. C. A. 1940), *certiorari denied* 311 U. S. 666, 85 L. Ed. 427, 61 S. Ct. 24.

In the Cawman case, supra, a brakeman fell to his death when dismounting from a caboose stopped on an unguarded bridge, while engaged in the performance of his duties. Like petitioner here, his personal representative relied on the failure of the employer to furnish a reasonably safe place to work. The Court at p. 834 of 110 F. 2d, stated:

> "There was no light, guard rail, or cat walk for the protection of those whose duties might require their physical presence on the non-existent flooring. We think this omission may constitute a breach of the conceded obligation to provide a safe place to work
>
> * * *. That obligation assumes as many forms as there are places to work. * * * The provision of mechanical safeguards is more simple than the employment of careful employees. Men are more fallible than machines, one lantern or a few boards and a man's life is saved."

See also *Bly v. Southern Railway Co.,* 183 Va. 162, 31 S. E. 2d 564, rehearing denied, 183 Va. 406, 32 S. E. 2d 659; *Bimberg v. Northern Pacific Railway Company,* 217 Minn. 187, 14 N. W. 2d 410, affirmed 14 N. W. 2d 419, (certiorari denied, 322 U. S. 752, 65 S. Ct. 87, 89 L. Ed. 602); *Rashaw v. Central Vermont Railway, Inc.,* 133 F. 2d 253 (2 C. C. A. 1943); *Murphy v. Boston and Maine Railroad,* 65 N. E. 2d 923 (Mass. 1946).

It is respectfully submitted that this holding of the Utah Court is contrary to the evidence and the controlling decisions of this Court.

Point III.

The Supreme Court of Utah erred in vacating and setting aside the jury's verdict, finding respondents negligent in the construction, maintenance and use of the bridge at Chacra, and in holding that as matter of law respondents were not so negligent.

The majority of the Utah Court, after holding that as matter of law the place where petitioner was working when injured was not a place to work, assumed for the purpose of discussion that it was. They then determine that even so respondents were under no duty to maintain it in a reasonably safe condition for its foreseeable use as such. It is difficult to follow reasoning of this sort. A negative answer was given to the primary question "Was the absence of a walk on the south side of the bridge a defect or insufficiency due to negligence in 'track, roadbed, or works' of defendants?" In returning this answer the Court left undecided the questions: (1) Was the bridge reasonably safe as a work place? (2) Was it negligently maintained in an unsafe condition for its foreseeable use? It can not be determined from the language of the opinion whether the Court decided that respondents were under no duty to maintain the bridge in a reasonably safe condition as a work place or whether it decided that such duty existed but had not been violated. The Court entirely disregards petitioner's charge of negligence upon which his whole case was based, but, on the contrary, creates for his benefit an imaginary charge. We quote:

> "The plaintiff charges the railroad with negligence in failing to provide a safe place to work but in view of the negligence of the plaintiff the charge really amounts to a failure of an alleged duty to place a platform so as to intercept the hapless course of the plaintiff started entirely by his own negligence." (R. 185).

In view of the Court's refusal to directly face and determine the fundamental issues presented by the pleadings and proof, the erroneous results reached are not surprising. The Court bases its findings upon speculation as to (1) the nature and extent of the probable results had petitioner conformed to the standard of care erected for him by the Court, and (2) the improbability of the happening of the event complained of. The Court states:

> "The test of whether appellant in such case was guilty of a negligence of omission is whether it could be reasonably anticipated that Pauly would drop off in the dark without using the means furnished him—in this case a lantern carried with him—to discover the nature of the terrain under him, when there was a walk on the other side safe to alight upon and in the face of a rule which instructed him that 'before getting on or off equipment, employees must look for a safe footing.'" (R. 187, 188)

We are unable to perceive how or in what manner petitioner's conduct could affect the static condition of the bridge or respondents' duty with respect to its safety. If the bridge was a place to work as the jury found and the Court assumed it to be, it was either safe or unsafe as matter of fact and petitioner's conduct could not in any way change, modify or eliminate the condition whatever it was.

The Utah Court held that respondents were not guilty of negligence in the maintenance of the bridge because they could not be charged with the duty of anticipating the negligence of petitioner. Determinations favorable to the respondents were made on the following governing propositions:

> "Thus we are referred back to the fundamental question under consideration, viz., whether the ap-

> pellant owed any duty to the plaintiff under the circumstances in this case. That involves an application of the time-worn principle as to whether the defendant as a prudent person could or should have reasonably anticipated that (1) a caboose would stop on the bridge and (2) that the conductor in the caboose would step off without looking, or, if he looked, would, in seeing nothing but darkness, not use his lantern to reveal the situation under him especially when there was a platform on the north side of the main track on which he could have alighted." (R. 190)

The Utah Court also approved the contention of respondents that petitioner was negligent as matter of law and that his negligence was the sole cause of his injuries. The Court states:

> "But here the mishap was initiated entirely by the negligence of the respondent not assisted nor contributed to by the appellant. * * * The respondent, under the spell of the impression that he was across the bridge, intentionally left a position which was safe without taking proper precautions to ascertain the nature of the footing below him and dropped into space, starting himself on the career of disaster." (R. 187)

The Court entirely overlooked the simple obvious fact that it would have been impossible for plaintiff to step from the caboose over the edge of the bridge had it been equipped with footwalk and guard rail. Petitioner fell and was injured because of the concurrence of his own conduct and that of the respondents in subjecting him to the dangers of the bridge. The bridge was dangerous because it was improperly constructed and maintained for its foreseeable use as a work place and therein lies the delect of respondents.

By so construing and considering petitioner's conduct the Utah Court has in effect made contributory negligence a complete defense in an action brought under the Federal Employers' Liability Act, it has thus judicially repealed that portion of the F. E. L. A. which eliminates contributory negligence as a defense in such actions.

From the language of the majority it is apparent that they are not in accord with the holding of this Court in the *Tiller* case, supra. They say: (R. 186)

> "It is to be hoped that in industry generally this differentiation between a workman having assumed the risks of his employer's negligence by continuing in the employment after he has notice of the danger, and the assumption of risks inherent in the industry difficult or impossible to eliminate, will be noted by the courts and given its former one time place in the law."

Their holding in this case reflects that attitude. They use the outlawed defense of contributory negligence to determine the nonexistence of respondents' negligence and hold that because of petitioner's negligence, respondents owed him no duty to platform or light the south side of this unguarded bridge. The act eliminates the defense of contributory negligence just as completely as it does the defense of assumption of risk.

The Utah Court avoids the obvious fact that the bridge was but a part of the territory between switches at Chacra and subject to the same usage and duty of care as the balance thereof. In determining whether or not the bridge was negligently maintained it cannot be disassociated from the remaining territory there. If a jury could properly find (as one did in the case at bar) that the whole of said territory was a work place, then it would necessarily follow that the bridge, being a part of a work area, should be

maintained in a reasonably safe condition for its foreseeable use. That being true, the duty with respect to its care and maintenance depends upon reasonable anticipation of harm to employees using this territory in the work of train protection, inspection and repair.

The jury found that respondents could reasonably foresee that trainmen intent upon the discharge of duty in the nighttime would alight from the south side of trains standing upon the bridge and for lack of lights, markers, footwalks and guard rails fall to the creek bed below.

Reasonable minds could well regard the bridge as dangerous to these men. Why did petitioner refer to it as a "darned bridge?" The answer is obvious. The bridge was a recognized source of danger. In the daytime when its existence and dimensions were plainly visible it was not dangerous, but on dark and stormy nights the bridge, like a trap skilfully set and skilfully concealed, became and was dangerous and hazardous.

It is a fair inference from the evidence that respondents not only knew that their train crews customarily used the territory between switches at Chacra as a place to inspect and make temporary train repairs but that they expected their train crews to make such use of said territory in order to avoid obstruction of traffic and delay of trains.

It is apparent from the evidence and testimony that respondents' trainmen were subjected to danger and hazard in the performance of their duties at Chacra by reason of the condition of the bridge.

It appeared without conflict from the map and photographs (Exhibits A, B, D, E, H, M, R. 205-219) and from the testimony of witnesses that the bridge was not equipped

with footwalks, guard rails, lights or markers; that the roadbed was constructed of black slag and that on a dark and stormy night the bridge was indistinguishable from its surroundings, and that respondents' train crews in the ordinary and usual performance of their duties were required to bring trains to a stop on these tracks at all hours of the day and night and in all kinds of weather, and that when stopped it became and was necessary for trainmen to dismount at the point where the engine or caboose was stopped and to proceed along the trains over the territory adjacent to the tracks.

Reasonable minds could well foresee the possibility of a trainman intent upon the performance of his duties stepping off a caboose or engine and falling headlong to the bottom of the creek when the caboose or engine was stopped over the bridge on a dark and stormy night. As heretofore pointed out the majority of the Utah Court eliminates this factor by holding that as matter of law petitioner should have been more careful and that the chances of such an occurrence were relatively small. By such process the Court has usurped the functions of the jury, deprived petitioner of his rights to jury trial, and relieved respondents of their non-delegable duty to furnish safe places for their employees to work. We submit that under the doctrine of *Bailey vs. Central Vt. Ry. Co.*, supra, this bridge was a work place and that respondents owed petitioner and other employees the duty to make it safe. In declaring the law, this court in that case at pp. 352-3 of 319 U. S., p. 1447 of 87 L. Ed., stated:

> "At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. * * * That rule is deeply engrained in federal jurisprudence. * * * As stated by this court in the Patton Case it is a duty which be-

> comes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.' • • • It is that rule which obtains under the Employers' Liability Act. • • •"

We believe that reasonable minds could not differ on the proposition that the unguarded bridge at Chacra was more hazardous than the protruding plank in *Chicago Great Western Railway Company vs. Peeler,* 140 F. 2d 865 (1944-8th C. C. A.) or the umbrella plant in *Haskins vs. Southern Pacific Company,* 3 Cal. App. 2d 177, 39 P. 2d 895 (1935) or the angle iron in *Smith vs. Schumacker,* 30 Cal. App. 2d 251, 85 P. 2d 967, Cert. den. 307 U. S. 646, 83 L. Ed. 1526, 59 S. Ct. 1046 or the spike in *Virginian Railway Company vs. Staton,* 84 F. 2d 133 (4th C. C. A.). 1936. Yet in all of those cases recovery was allowed. The unguarded bridge was a permanent fixture, it extended 92 feet along the territory where employees were required to perform the duties of their employment. The plank, umbrella plant, angle iron and spike were temporary and insignificant when compared with this unguarded bridge. The chances of injury from them as compared to the chances of injury from the bridge are inconsequential.

The authorities abundantly support the proposition that carriers must keep the territory along tracks where employees may be required to alight from cars, engines or other equipment in a reasonably safe condition for such purpose. See *Chicago, Great Western Railway Company v. Peeler,* supra; *Haskins v. Southern Pacific Company,* supra; *Smith v. Schumacker,* supra. In the Haskins case, supra, at page 897 of 39 Pac (2), the Court stated:

> "• • • there are numerous cases in which liability for negligence has been imposed upon railroad companies for injuries caused by obstructions • • • which were allowed to remain on rights of way in places where employees were required to work."

That this duty required respondents to keep both sides of the tracks between switches at Chacra in a reasonably safe condition is supported by the decision in *Thompson v. Boles,* 123 F. (2) 487, 492, (8 C. C. A. 1941), Cert. Den. 315 U. S. 804, 86 L. Ed. 1204, 62 S. Ct. 632, wherein the Court states:

> "The duty to exercise reasonable care in furnishing a safe place to work did not pertain to any particular area on this walkway. As stated in Kenmont Coal Co. v. Patton, 6 Cir., 268 F. 334, 336, 'Defendant's duty with respect to furnishing decedent a safe place to work was not necessarily confined to the precise spot in which decedent was to work.' "

It is submitted that the respondents themselves established a standard for the construction and maintenance of bridges located as was the bridge at Chacra, and that they themselves failed to construct, equip and maintain the bridge at Chacra according to their own standard of care. Petitioner testified and his testimony was uncontradicted that he was familiar with the bridges over gullies, creeks, canyons, etc., within switch limits in the division embracing Chacra. That with the exception of the bridge at Chacra all such bridges were equipped with foot walks and hand rails and with one exception painted white (R. 140-1-2, 145-6).

The Utah Court takes the position that inasmuch as there was a platform over the bridge between the tracks the bridge was, therefore, safe as matter of law and fact. This argument lends nothing to the solution of the problem presented except confusion. If the territory between

switches at Chacra was a work place, then the dictates of duty required the whole of it to be maintained reasonably safe for its foreseeable use. No contention has ever been made that dismounting from the south side of a train standing on the main line at Chacra on a dark night would constitute negligence except perhaps when the act of dismounting was from a car standing on the bridge. It is respectfully submitted that the Utah Court's position on this matter, therefore, must be either (1) that the territory between switches at Chacra is not a place of work as matter of law, or (2) that all of such territory is a work place and must be maintained in a reasonably safe condition for foreseeable use except the bridge or (3) that all of such territory is a work place and must be maintained in a reasonably safe condition for foreseeable use except the south side of the bridge.

Contrary to the evidence the Utah Court found as matter of law that this territory was not a place of work, but, evidently feeling insecure in its position on this point, assumed it to be a work place and then attempted to demonstrate that the bridge was not negligently maintained in an unsafe condition for its foreseeable use because of the platform between the tracks. It is apparent that the second and third alternatives above mentioned are untenable. The suggestion that petitioner could have dismounted from the north side in safety is of no relevance if the bridge be not a work place. It amounts to no more than the showing of contributory negligence if it is a work place.

If the bridge is a work place as the jury found it to be, then it should require no argument to demonstrate that the duty of making it safe for foreseeable use could not be discharged by maintaining a portion of it only in a safe condition. To argue that petitioner could have dismounted

in safety from the north side necessarily involves a tacit admission that a jury could well find from the evidence that the bridge was within and a part of a work area. The Court overlooked the fact that petitioner did not wilfully and knowingly step off the bridge. As the jury found, there were many reasons attributable to the negligence of respondents for his injuries. He is certainly entitled to the benefit of the familiar presumption that he would not knowingly and wilfully indulge in conduct calculated to bring serious physical injury to himself. If he had known that the caboose was on the bridge and that he was stepping off into space this accident would never have occurred. Petitioner is certainly possessed of the same vital instinct of self-preservation which governs the acts of us all, the suggestions in the opinion of the Utah Court to the contrary notwithstanding.

If safety of trainmen dictated the placement of the platform between the tracks as contended by respondents and suggested by the Utah Court, then such consideration should likewise have suggested the placement of platforms on the outside of the tracks. It is clear from the evidence that in keeping with respondents' rules and established custom and practice trainmen would be expected to alight from trains more frequently upon the side away from the passing tracks. The rule requiring and the custom of dismounting on the side of the train away from passing tracks or passing trains establish this to be so.

If the foreseeability of harm or danger to employees using the track and road bed between switches at Chacra as a place to work is an important factor in determining respondents' duty of care with respect to the bridge, then the respondents should certainly be charged with the duty of making safe the south side of the bridge inasmuch as respondents would be charged with the reasonable ex-

pectation that the south shoulder of the track would be used to alight upon more frequently than the north shoulder. That duty could not be discharged by rendering safe the north side of the bridge, the side less frequently used by trainmen for such purpose. If the foregoing is true, and we submit it is, then the provision of the platform between tracks does not obviate or excuse the failure to platform and make reasonably safe the south side of the bridge.

Under proper instructions, the jury found that respondents should have reasonably foreseen the likelihood of injury to their employees because of the condition of the bridge; they further found that respondents did not keep this portion of the territory (the unguarded and unlighted bridge) safe either reasonably or at all. In any event, the whole matter was submitted to the jury for determination as matter of fact. In holding the respondents liable, it was necessary, under the instructions, for the jury to find, and it did find (1) that respondents could reasonably anticipate that petitioner or other employees would alight in the nighttime from the south side of respondents' train while it was on the Chacra bridge, (2) that respondents did not maintain the south side of said bridge in a reasonably safe condition, (3) that such failure amounted to a lack of due care and in whole or in part proximately caused petitioner's injuries. (See Instruction No. 9, R. 14).

The Utah Supreme Court meets this proposition by minimizing the chances of the happening of the event complained of. They state:

> "Only in case where trouble occurred on such place on the line as to permit the train to pull into the passing track at Chacra would there be any need of the conductor alighting. The chance of the caboose stopping on this bridge would depend on where the train

> stopped and its length. It is obvious that the chances that it would be stopped there as against some other place between the switches of the Chacra passing were small. The chances that if it was so stopped on this bridge the conductor would get off or if he did that it would be on the south side of the main track and that he would not at night investigate before he alighted were so remote as to make such mishap only a possibility and not a probability. The employer need not guard against the mere possibility that an employee may start himself solely by his own act on a course of mishap, and make the premises safe against such possibility even granted it is a place to work." (R. 188, 189).

And again:

> "Certainly a prudent railroad could have anticipated that a caboose might be stopped on the bridge. But it could also anticipate that the times it would stop on the bridge would be few compared to the times it would stop off the bridge. But that when it did happen to stop on the bridge that the conductor or other employee would drop down in disregard of ascertaining what was under him when there was a platform on the other side, would be only a remote and only a possible risk which a prudent person would not consider need be guarded against. A neglect to do so cannot be considered negligence." (R. 190).

The approval of reasoning of this character would provide judicial justification for extreme neglect in the care and maintenance of yards and switch tracks. If this process of reasoning is legally sound a railroad company may, in safety to itself, entirely disregard its duty to keep and maintain yards and roadbeds in a reasonably safe condition for foreseeable use as a work place. It could successfully resist claims for injury and damage sustained by switchmen and trainmen stumbling and falling over

ties, boulders, clinkers, angle irons and other objects permitted to remain upon the tracks and roadbed upon the fallacious ground of extreme improbability of the happening of the event. The company could well say, as the Utah Supreme Court in effect has said,

> "The chances of our trains stopping near these objects are remote. The chances of our employees being injured as a result of these conditions are more remote. The chances that our employees will fail to discover the dangers incident to these conditions are still more remote and, therefore, we should as matter of law be absolved from all responsibility for our neglect,"

thus defeating the very purpose of the Federal Employers' Liability Act.

It is interesting to note the extreme liberality (as far as respondents are concerned) with which the Court views the conduct of the respondents. Let us suggest the use of the same standard in viewing the conduct of petitioner. Assume that he was conscious of the fact that the bridge was unlighted and unguarded, but in the performance of his duties he figured that the chance of the caboose being stopped over the bridge was nothing more than a mere possibility inasmuch as there was 6500 feet of shoulder along the track between switches where the caboose could be stopped without being over the bridge and only 92 feet of space where it could be stopped when over the bridge. Being thus assured of his safety he dismounted without thinking or looking, and fell to the creek bed and was injured. By using the Court's reasoning in determining whether or not he was negligent, he suggests that his chances of alighting on solid ground were excellent and very much greater than the chances of falling into the creek, in fact 65 to 1, and that because of the extreme improbability of

stepping off the caboose at a time when it was standing on the bridge and the slight possibility of harm involved any lack of care on his part would be unworthy of consideration by the Court or anyone else and, therefore, as matter of law he could not be negligent. Certainly the reasoning should work both ways.

We submit that the recent case of *Boston & M. R. R. v. Meech*, 156 F. 2d 109, 111, (1 C. C. A. 1946) (Certiorari denied October 28, 1946, 15 L. W. 3171, not yet officially reported) announces the proper rule to be used in determining whether a case involving failure to furnish a reasonably safe place to work should be submitted to a jury. In that case the employee was killed by an engine backing into him while he was working on a platform adjacent to the tracks. Plaintiff relied upon the failure of the defendant to furnish the employee a reasonably safe place to work. The Court held that the evidence clearly supported a verdict based upon such failure and stated:

> "The defendant might have painted lines on the platforms of its washstand to indicate the extent to which locomotives overhang them, and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it might even have set the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all.
>
> "From the foregoing, it is clear that although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted.' Lavender v. Kurn et al., supra, (66 S. Ct. 744)."

In the case at bar the respondents could have taken further precautions to make the bridge at Chacra safe by placing either lights or markers, or guard rail and platform on the south side. Under the Meech case their failure so to do furnished an evidentiary basis for the verdict of the jury.

It is respectfully submitted that the verdict of the jury finding respondents negligent in the construction, care and maintenance of the bridge as a place to work was supported by substantial evidence and that the Utah Court committed reversible error in holding as matter of law that respondents were not negligent in the construction, maintenance and use of the bridge.

Point IV.

The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law.

(a) By holding that the failure of respondents to properly construct, equip and maintain the bridge did not contribute in whole or in part to cause petitioner's injuries, and

(b) By holding that petitioner was negligent and that such negligence was the sole proximate cause of his injuries.

(a) *The Utah Court erred in holding that the failure of respondents to properly construct, equip and maintain the bridge did not contribute, in whole or in part, to cause petitioners' injuries.*

The majority hold that the failure of respondents to light or platform the Chacra bridge "would not have caused or contributed to his accident, or put another way,

the petitioner's "accident" was "not a contributed result of the lack of a platform to stop him." (R. 190)

This holding on the question of proximate cause is in conflict with *Tennant vs. Peoria and Pekin Union R. Co.*, supra. There the question was whether the failure to give warning of the intended movement of a train could be found by the jury to be a proximate cause of the death of an employee. The Court at p. 34 of 321 U. S., p. 524 of 88 L. Ed., said:

> "The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable 'for * * * death resulting in whole or in part from the negligence of any of the * * * employees.'".

A jury could reasonably find that the absence of the platform contributed to the cause of petitioner's injuries. If the platform had been properly installed on the bridge, petitioner in all probability would have alighted on it and escaped injury. "The ultimate inference that" petitioner "would not have been" injured "but for the failure to" platform the bridge or to warn of its presence by lights or markers "is therefore supportable." A platform, guard rails, lights or markers "might well have saved him from harm." Proximate cause is ordinarily a question for the jury. *Lavender v. Kurn*, supra, *Bailey v. Central Vermont R. R. Co.*, supra, *Tennant v. Peoria* and *Pekin Union R. Co.*, supra. *Illinois C. R. Co. vs. Skaggs*, 240 U. S. 66, 60 L. Ed. 528, 36 S. Ct. 249; *Union Pacific R. Co. vs. Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318; *Spokane & Inland Empire R. R. Co., vs. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683,

(b) *The Utah Court erred in holding that petitioner was negligent and that such negligence was the sole proximate cause of his injuries.*

Petitioner's negligence was for the jury. It is submitted that the verdict of the jury on this matter should be accepted as it should be accepted on the question of respondents' negligence. The majority hold that petitioner was negligent as matter of law because (1) he did not use his lantern or fusee to see what was before him, (2) he acted on the impression that the caboose had passed over the bridge, and (3) he alighted on the south side of the tracks instead of the north side.

The jury found that petitioner was contributorily negligent and therefore reduced his damages one-third. We believe that this matter was properly submitted to the jury and that the Utah Court was in error in holding that petitioner was negligent as matter of law.

The evidence established without contradiction that the acts of petitioner were in accordance with the practice of railroad workers. As to the ordinary way of dismounting from a train in the nighttime petitioner testified:

> "You look down as you step, you don't make any examination with your light, you have your light in your hand, you just step down, see that it is black and you walk along for firm footing, you don't take any time to examination." (R. 143).

And again:

> "I never made any examination with my lantern as to where I was stepping, but just like all railroad men when they are getting on and off of a car, they make a glance. It looked like it was black when I stepped, looked like I was still standing on the right of way." (R. 95, 96).

That he did not make a minute examination and feel his way along did not make him negligent as matter of law. He was acting in the usual and ordinary manner and as other railroad men usually acted. By reason of the darkness of the night and the black roadbed he mistakenly believed the caboose was over solid ground. No provisions were made by respondents to call his attention to the location of this bridge. He was intent upon the performance of his duties to expedite the movement of his train and did not make a thorough examination of the roadbed.

He dismounted in accordance with respondents' safety rules, on the side away from passing tracks, and the testimony was uncontradicted that this was the proper side from which to dismount, and in addition the difficulty to be located and remedied appeared to be on that side and he therefore "naturally" alighted from that side. (R. 90).

That he was under the impression that the caboose had passed the bridge and acted on that impression would not be negligence as matter of law. The majority even admits it was a "very human thing to do." (R. 183). Certainly respondents afforded no warning to dispel that impression. Therein were they negligent.

The Utah Court, not being content with the finding of the jury to the effect that petitioner was negligent, goes further and holds as a matter of law that his negligence was the sole proximate cause of his injury. This finding of negligence was employed to support the finding of absence of duty on the part of respondents and thus it became a complete defense to petitioner's action. The Federal Employers' Liability Act expressly eliminates contributory negligence as a defense (U. S. C. A., Title 45, Sec. 53). In the very face of this plainly worded statute the majority of the Utah Court held that the contributory negligence of the petitioner barred recovery. They reach this er-

roneous result by using the simple expedient of calling contributory negligence "sole proximate cause." This Court denounced that subterfuge in *Grand Trunk Western R. R. Co. vs. Lindsay,* 233 U. S. 42, 47, 34 S. Ct. 581, 58 L. Ed. 838, 842, in the following language:

> "* * * and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendants' negligence, the statute would be nullified by calling plantiff's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence."

This doctrine was reaffirmed in *Tiller vs. Atlantic Coast Line R. Co.,* supra. The holding of the Utah Court on the question of proximate cause is likewise contrary to the decisions of this Court in: *Illinois C. R. Co. vs. Skaggs,* supra, 240 U. S. 66, 60 L. Ed. 528, 36 S. Ct. 249; *Union Pacific R. Co. vs. Hadley,* 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318; *Spokane & Inland Empire R. R. Co. vs. Campbell,* 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683.

The Utah Court, after suggesting that petitioner was the only active participant in the final event, holds that the sole proximate cause of his injuries was his own neglect. This holding is used not only to support the finding that the place where petitioner was working when he was injured was not a place to work but also the companion finding that the respondents were not negligent in the construction, care and maintenance of the bridge. This argument is not only fallacious in principle, inasmuch as no significance is attributed to the condition of the bridge and its location, but is contrary to the holdings in the controlling decisions of this Court. From the decision in Illinois C. R. Co. v. Skaggs, supra, at page 250 of 36 S. Ct., we quote:

"It is contended that the State Court erred in permitting a recovery under the Federal Statute for the reason that the injury resulted from Skagg's own act, or from an act in which he participated. The company, it is said, 'cannot be negligent to an employee whose failure of duty and neglect produced the dangerous condition.' It may be taken for granted that the Statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents, or employees of the employing carrier, *or by reason of any defect or insufficiency, due to its negligence, in its property or equipment.* 35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sec. 8657. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act."

The Utah Court in effect nullified the F. E. L. A. by refusing to give effect to the supportable finding that petitioner's injuries were caused in whole or in part by respondents' negligence. An enlightening discussion of this principle is found in the recent case of *Eglsaer v. Scandrett*, 151 Fed. (2d) 562 (7th C. C. A. 1945) commencing at page 565.

"'* * * it seems clear, in the light of the provisions above abstracted, that the liability statute definitely recognizes the complex causal basis of most injuries, and, in effect, states that if, among the several factors which have combined to produce an injury within the purview of the statute, there shall be found *any negligent act or omission on the part of the carrier to which*

> *such injury was in part due, then liability for such injury shall fall upon the carrier.'*

The Utah Court was evidently unmindful of its own declaration in an identical case: *Miller vs. Western Pac. R. Co.*, 1929, 73 Utah 442, 455, 274 P. 945, where a trainman in the nighttime stepped from a caboose while it was standing on a bridge.

> "The fact that plaintiff may not have exercised ordinary care before stepping from the caboose, as indicated by the evidence, goes only to the question of his contributory negligence, which is not material to the question presented here."

The injuries to petitioner resulted from the concurring negligence of respondents and his own conduct. Both were necessary to produce the end result. The negligence of respondents having contributed to the cause of the injury, the question of proximate cause was properly left to the jury and the majority of the Utah Court erred in substituting its judgment for that of the jury and in setting aside the verdict and dismissing the case. *Grand Trunk W. R. Co. vs. Lindsay*, supra; *Rocco vs. Lehigh Valley R. R. Co.*, 288 U. S. 275, 77 L. Ed. 743, 53 S. Ct. 343; *Miller vs. Central R. Co.*, 58 Fed. (2d) 635 (C. C. A. 3rd, 1932); *Gildner vs. Baltimore & O. R. Co.*, 90 F. (2d) 635 (C. C. A. 2nd, 1937); *Mumma vs. Reading Co.*, 146 F. (2d) 215 (C. C. A. 3rd, 1944); *Norfolk & W. Ry. Co. vs. Riggs*, 98 F. (2d) 612 (C. C. A. 6th, 1938); *Ballard v. Atchison T. & S. F. Ry. Co.*, 100 F. (2d) 162 (C. C. A. 5th, 1938); *Atchison T. & S. F. Ry. Co. v. Ballard*, 108 F. (2d) 768 (C. C. A. 5th, 1940); *McCarthy vs. Pennsylvania R. Co.*, 156 F. 2d 877 (7 C. C. A. 1946).

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Utah should be reversed as being in conflict with the express provisions of the Federal Employers' Liability Act and the controlling provisions of this Court construing that Act, and that the verdict of the jury and the judgment of the trial court should be reinstated.

Respectfully submitted

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APPENDIX

Sec. 51, Title 45 U. S. Code Annotated:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

Sec. 53, Title 45 U. S. Code Annotated:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negli-

gence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66."

Sec. 54, Title 45 U. S. Code Annotated:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."